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## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,403

ALABAMA ELECTRIC COOPERATIVE, INC., *Petitioner*

v.

SECURITIES AND EXCHANGE COMMISSION, *Respondent*
ALABAMA POWER COMPANY AND THE SOUTHERN COMPANY, *Intervenors*

Petition to Review an Order of
The Securities and Exchange Commission

Decided November 24, 1965

*Mr. Bennett Boskey,* with whom *Mr. Joseph Volpe, Jr.,* was on the brief, for petitioner.

*Mr. Ellwood L. Englander,* Assistant General Counsel, Securities and Exchange Commission, with whom *Messrs. Philip A. Loomis, Jr.,* General Counsel, and *David Ferber,* Solicitor, Securities and Exchange Commission, were on the brief, for respondent. *Mr. Robert W. Cox,* Attorney, Securities and Exchange Commission, also entered an appearance for respondent.

*Mr. John Bingham,* of the bar of the Supreme Court of Alabama, *pro hac vice,* by special leave of court, with whom *Mr. Ezekiel G. Stoddard* was on the brief, for intervenors.

Before: EDGERTON and WILBUR K. MILLER, *Senior Circuit Judges,* and MCGOWAN, *Circuit Judge.*

WILBUR K. MILLER, *Senior Circuit Judge*: On January 21, 1965, The Southern Company, a registered holding company,[1] and certain of its public utility subsidiaries

[1] Under the Public Utility Holding Company Act, 15 U.S.C. §§ 79 *et seq.*, 49 STAT. 838.

including Alabama Power Company, filed with the Securities and Exchange Commission a joint application-declaration seeking authorization for the issue by Alabama Power and the purchase by Southern of 140,000 shares of common stock for $14,000,000, the proceeds to be used by Alabama Power in its 1965-1966 construction program. Exemption from the provisions of Section 6(a) of the Public Utility Holding Company Act[2] was claimed under that portion of Section 6(b) which is reproduced in the margin.[3]

Alabama Electric Cooperative, Inc., which provides electric energy to certain municipalities and local cooperatives in the general area in which Alabama Power operates, petitioned for leave to intervene. It alleged that Alabama Power intended to use a part of the proceeds of the stock sale for construction of lines and other facilities which would duplicate its own, and asked that the Commission condition its authorization so to as prevent such use of any part of the proceeds of the stock sale. Alabama Electric also requested a hearing.

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[2] Section 6(a), 15 U.S.C. § 79f(a), is in pertinent part as follows:

> "Except in accordance with a declaration effective under section 7 and with the order under such section permitting such declaration to become effective, it shall be unlawful for any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly (1) to issue or sell any security of such company . . . ."

[3] ". . . The Commission by rules and regulations or order, subject to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consumers, shall exempt from the provisions of subsection (a) the issue or sale of any security by any subsidiary company of a registered holding company, if the issue and sale of such security are solely for the purpose of financing the business of such subsidiary company and have been expressly authorized by the State commission of the State in which such subsidiary company is organized and doing business . . . ."

On June 1, 1965, the SEC denied Alabama Electric's petition for intervention and for a hearing, and authorized the issuance and sale of stock as proposed by Southern and Alabama Power. It pointed out that such issue and sale are solely for the purpose of financing the business of Alabama Power and have been expressly authorized by the Public Service Commission of Alabama,[4] the state in which Alabama Power is organized and doing business; thus, exemption under Section 6(b) of the Act was granted. The SEC held the Cooperative's intervention and a hearing would not be in the public interest.

The Cooperative petitions for review. It says SEC erred in refusing to consider conditioning its authorization of the stock sale by providing that no part of the proceeds thereof should be used to duplicate Alabama Electric's facilities. This was within the power of the Commission, it contends, because Section 6(b) of the Act directs the SEC to grant exemption in some circumstances, "subject to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consummers . . . ." In making this argument, the Cooperative

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[4] As Alabama Power Company is incorporated in and operates only in Alabama, the proposed financing was first submitted to the Alabama Public Service Commission, which conducted an evidentiary hearing. Alabama Electric, permitted to intervene, participated in the hearing, introduced evidence, and made the same arguments it advances here.

The State Commission found that the proposed financing (which included the stock issue involved here) "Is for lawful objects within the corporate purposes of petitioner [Alabama Power], viz: . . . acquiring or constructing plants, properties, permanent improvements, extensions and additions to petitioner's property to be used in its public utility business . . . ." It further found the financing to be "compatible with the public interest," as well as "necessary, appropriate for and consistent with the proper preformance . . . of [petitioner's] service to the public . . . ." Accordingly, the proposed financing was approved, without the restriction on the use of the proceeds requested by Alabama Electric.

necessarily equates the statutory term "public interest" with that term as it is used in licensing or certification statutes. Therein lies the fallacy of its contention.

As the Commission said, "Words like 'public interest' and the interest of 'investors or consumers,' though of wide generality, take their meaning and definition from the substantive provisions and purposes of the Act." Sections 6 and 7 deal with the issuance of securities by a registered holding company or its subsidiary and the SEC's jurisdiction thereunder is to control such issuance and regulate the terms and conditions of those securities which are approved. The Cooperative would have it that the SEC's jurisdiction extends further: that it may, and should, forbid construction of some of the new facilities which the Alabama Commission has authorized, thus superseding the state agency in its normal regulation of public utility operations.

The purpose of the Public Utility Holding Company Act, as shown by its legislative history, was to supplement state regulation—not to supplant it. Nowhere in the Act is there a provision granting to the SEC the sort of regulatory power attributed to it by the petitioner. Indeed, the congressional choice of that Commission to administer the Act is, in itself, the strongest sort of proof that the general purpose of the Act was to regulate the issuance of securities which could not be reached by state commissions.

Section 10 of the Act, 15 U.S.C. § 79j, which has to do with the approval of the acquisition of securities, is helpful in the consideration of Section 6(b). Subsection (e) is as follows:

> "(e) The Commission, in any order approving the acquisition of securities or utility assets, may preclude such terms and conditions in respect of such acquisition, including the price to be paid for such securities or utility assets, as the Commission may find

necessary or appropriate in the public interest or for the protection of investors or consumers."

This section serves to confirm our conviction that the language of Section 6(b) upon which petitioner relies, has the restricted meaning attributed to it by the SEC.

The Cooperative's appeal from the Alabama Commission's order, which is now pending, does not prevent the SEC from relying upon the State Commission's approval in granting exemption. The Act directs the SEC to proceed when the state commission has approved. We note, however, that the SEC's Rule 24(c)(2) provides that, where a proposed transaction is to be carried out pursuant to the express authorization of a state commission, the SEC's authorization granted pursuant thereto is automatically "revoked and terminated" if the state commission's action is subsequently "modified, revoked or otherwise terminated." This rule affords adequate protection to the successful appellant from the state commission's order.

We hold that the SEC acted properly and with commendable restraint in refusing to exercise the enlarged jurisdiction which the Cooperative urged upon it.

*Affirmed.*

# APPENDIX B

## Statutory Provisions

### Section 1. Holding Company Act (15 U.S.C. § 79a)

§ 79a. *Necessity for control of holding companies*

(a) Public-utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things, (1) their securities are widely marketed and distributed by means of the mails and instrumentalities of interstate commerce and are sold to a large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are often made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary public-utility companies often sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage; (5) their activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies.

(b) Upon the basis of facts disclosed by the reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session), the reports of the Committee on Interstate and Foreign Commerce, House of Representatives, made pursuant to H. Res. 59 (Seventy-second Congress, first session) and H.J.Res. 572 (Seventy-second Congress, second session) and otherwise disclosed and ascertained, it is declared that the national public interest, the interest of investors in the securities of holding companies and their subsidiary companies and affiliates, and the interest of consumers of electric energy and natural and manufactured gas, are or may be adversely affected—

(1) when such investors cannot obtain the information necessary to appraise the financial position or earning power of the issuers, because of the absence of uniform standard accounts; when such securities are issued without the approval or consent of the States having jurisdiction over subsidiary public-utility companies; when such securities are issued upon the basis of fictitious or unsound asset values having no fair relation to the sums invested in or the earning capacity of the properties and upon the basis of paper profits from intercompany transactions, or in anticipation of excessive revenues from subsidiary public-utility companies; when such securities are issued by a subsidiary public-utility company under circumstances which subject such company to the burden of supporting an over capitalized structure and tend to prevent voluntary rate reductions;

(2) when subsidiary public-utility companies are subjected to excessive charges for services, construction work, equipment, and materials, or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; when service, management, construction, and other contracts involve the allocation of charges among subsidiary public-utility companies in different States so as to present problems of regulation which cannot be dealt with effectively by the States;

(3) when control of subsidiary public-utility companies affects the accounting practices and rate, dividend, and other policies of such companies so as to complicate and obstruct State regulation of such companies, or when control of such companies is exerted through disproportionately small investment;

(4) when the growth and extension of holding companies bears no relation to economy of management

and operation or the integration and coordination of related operating properties; or

(5) when in any other respect there is lack of economy of management and operation of public-utility companies or lack of efficiency and adequacy of service rendered by such companies, or lack of effective public regulation, or lack of economies in the raising of capital.

(c) When abuses of the character above enumerated become persistent and wide-spread the holding company becomes an agency which, unless regulated, is injurious to investors, consumers, and the general public; and it is declared to be the policy of this chapter, in accordance with which policy all the provisions of this chapter shall be interpreted, to meet the problems and eliminate the evils as enumerated in this section, connected with public-utility holding companies which are engaged in interstate commerce or in activities which directly affect or burden interstate commerce; and for the purpose of effectuating such policy to compel the simplification of public-utility holding-company systems and the elimination therefrom of properties detrimental to the proper functioning of such systems, and to provide as soon as practicable for the elimination of public-utility holding companies except as otherwise expressly provided in this chapter. Aug. 26, 1935, c. 687, Title I, § 1, 49 Stat. 803.

**Sections 6(a) and 6(b). Holding Company Act (15 U.S.C. § 79f(a) and § 79f(b)).**

§ 79f. *Unlawful transactions by registered companies—Issuing, selling, or altering rights of stockholders to declaration.*

(a) Except in accordance with a declaration effective under section 79g of this title and with the order under such section permitting such declaration to become effective, it shall be unlawful for any registered holding company or

subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, directly or indirectly (1) to issue or sell any security of such company; or (2) to exercise any privilege or right to alter the priorities, preferences, voting power, or other rights of the holders of an outstanding security of such company.

*Exemptions from operation of subsection (a)*

(b) The provisions of subsection (a) of this section shall not apply to the issue, renewal, or guaranty by a registered holding company or subsidiary company thereof of a note or draft (including the pledge of any security as collateral therefor) if such note or draft (1) is not part of a public offering, (2) matures or is renewed for not more than nine months, exclusive of days of grace, after the date of such issue, renewal, or guaranty thereof, and (3) aggregates (together with all other then outstanding notes and drafts of a maturity of nine months or less, exclusive of days of grace, as to which such company is primarily or secondarily liable) not more than 5 per centum of the principal amount and par value of the other securities of such company then outstanding, or such greater per centum thereof as the Commission upon application may by order authorize as necessary or appropriate in the public interest or for the protection of investors or consumers. In the case of securities having no principal amount or no par value, the value for the purposes of this subsection shall be the fair market value as of the date of issue. The Commission by rules and regulations or order, subject to such terms and conditions as it deems appropriate in the public interest or for the protection of investors or consumers, shall exempt from the provisions of subsection (a) of this section the issue or sale of any security by any subsidiary company of a registered holding company, if the issue and sale of such security are solely for the purpose of financing the business of such subsidiary company and have been ex-

pressly authorized by the State commission of the State in which such subsidiary company is organized and doing business, or if the issue and sale of such security are solely for the purpose of financing the business of such subsidiary company when such subsidiary company is not a holding company, a public-utility company, an investment company, or a fiscal or financing agency of a holding company, a public utility company, or an investment company. The provisions of subsection (a) of this section shall not apply to the issue, by a registered holding company or subsidiary company thereof, of a security issued pursuant to the terms of any security outstanding on Janary 1, 1935, giving the holder of such outstanding security the right to convert such outstanding security into another security of the same issuer or of another person, or giving the right to subscribe to another security of the same issuer or another issuer. Within ten days after any issue, sale, renewal, or guaranty exempted from the application of subsection (a) of this section by or under authority of this subsection, such holding company or subsidiary company thereof shall file with the Commission a certificate of notification in such form and setting forth such of the information required in a declaration under section 79g of this title as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

**Section 10. Holding Company Act (15 U.S.C. § 79j).**

§ 79j. *Approval of acquisition of securities and utility assets and other interests—Contents of Application*

(a) A person may apply for approval of the acquisition of securities or utility assets, or of any other interests in any business, by filing an application in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the

protection of investors and consumers. Such application shall include—

(1) in the case of the acquisition of securities, such information and copies of such documents as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers in respect of—

(A) the security to be acquired, the consideration to be paid therefor, and compliance with such State laws as may apply in respect of the issue, sale, or acquisition thereof,

(B) the outstanding securities of the company whose security is to be acquired, the terms, position, rights, and privileges of each class and the options in respect of any such securities,

(C) the names of all security holders of record (or otherwise known to the applicant) owning, holding, or controlling 1 per centum or more of any class of security of such company, the officers and directors of such company, and their remuneration, security holdings in, material contracts with, and borrowings from such company and the offices or directorships held, and securities owned, held, or controlled, by them in other companies,

(D) the bonus, profit-sharing and voting-trust agreements, underwriting arrangements, trust indentures, mortgages, and similar documents, by whatever name known, of or relating to such company,

(E) the material contracts, not made in the ordinary course of business, and the service, sales, and construction contracts of such company,

(F) the securities owned, held, or controlled, directly or indirectly, by such company,

(G) balance sheets and profit and loss statements of such company for not more than the five preceding fiscal years, certified, if required by the rules and regulations of the Commission by an independent public accountant,

(H) any further information regarding such company and any associate company or affiliate thereof or its relations with the applicant company, and

(I) if the applicant be not a registered holding company, any of the information and documents which may be required under section 79e of this title from a registered holding company;

(2) in the case of the acquisition of utility assets, such information concerning such assets, the value thereof and consideration to be paid therefor, the owner or owners thereof and their relation to, agreements with, and interest in the securities of, the applicant or any associate company thereof as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers; and

(3) in the case of the acquisition of any other interest in any business, such information concerning such business and the interest to be acquired, and the consideration to be paid, as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

*Conditions affecting approval*

(b) If the requirements of subsection (f) of this section are satisfied, the Commission shall approve the acquisition unless the Commission finds that—

(1) such acquisition will tend towards interlocking relations or the concentration of control of public-

utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers;

(2) in case of the acquisition of securities or utility assets, the consideration, including all fees, commissions, and other remuneration, to whomsoever paid, to be given, directly or indirectly, in connection with such acquisition is not reasonable or does not bear a fair relation to the sums invested in or the earning capacity of the utility assets to be acquired or the utility assets underlying the securities to be acquired; or

(3) such acquisition will unduly complicate the capital structure of the holding-company system of the applicant or will be detrimental to the public interest or the interest of investors or consumers or the proper functioning of such holding-company system.

The Commission may condition its approval of the acquisition of securities of another company upon such a fair offer to purchase such of the other securities of the company whose security is to be acquired as the Commission may find necessary or appropriate in the public interest or for the protection of investors or consumers.

*Conditions barring approval*

(c) Notwithstanding the provisions of subsection (b) of this section, the Commission shall not approve—

(1) an acquisition of securities or utility assets, or of any other interest, which is unlawful under the provisions of section 79h of this title or is detrimental to the carrying out of the provisions of section 79k of this title; or

(2) the acquisition of securities or utility assets of a public-utility or holding company unless the Commis-

sion finds that such acquisition will serve the public interest by tending towards the economical and efficient development of an integrated public-utility system. This paragraph shall not apply to the acquisition of securities or utility assets of a public-utility company operating exclusively outside the United States.

*Approval to be granted in reasonable time*

(d) Within such reasonable time after the filing of an application under this section as the Commission shall fix by rules and regulations or order, the Commission shall enter an order either granting or, after notice and opportunity for hearing, denying approval of the acquisition unless the applicant shall withdraw its application. Amendments to an application may be made upon such terms and conditions as the Commission may prescribe.

*Terms and conditions of order granting approval*

(e) The Commission, in any order approving the acquisition of securities or utility assets, may prescribe such terms and conditions in respect of such acquisition, including the price to be paid for such securities or utility assets, as the Commission may find necessary or appropriate in the public interest or for the protection of investors or consumers.

*Compliance with State laws as condition of approval*

(f) The Commission shall not approve any acquisition as to which an application is made under this section unless it appears to the satisfaction of the Commission that such State laws as may apply in respect of such acquisition have been complied with, except where the Commission finds that compliance with such State laws would be detrimental to the carrying out of the provisions of section 79k of this title. Aug. 26, 1935, c. 687, Title I, § 10, 49 Stat. 818.

**Section 10(e). Administrative Procedure Act (5 U.S.C. § 1009(e)).**

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, § 10, 60 Stat. 243.